

Robinson+Cole

Manufacturing Law Group

June 14, 2018



Please Note

This roundtable is designed to provide accurate information about the subject matter. However, it only provides general information and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, let us know directly.

Preliminary Considerations

- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions, and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

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The Foreign Corrupt Practices Act (FCPA)

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Presentation Overview

- Recent Article
- FCPA – Overview/Resources
- Top FCPA Misconceptions
- Investigation/Enforcement
- Risks/Warning Signs

In-House Lawyer at Keppel Offshore & Marine Ltd. Pleads Guilty to Conspiracy to Violate the FCPA

- Jeffrey Chow, 59, plead guilty in August 2017, to conspiracy to violate the FCPA. Chow, a U.S. citizen, was a lawyer at Keppel Offshore & Marine and worked at the company's Singapore location over 25 years.
- The Singapore-based company operates shipyards and repairs and upgrades marine vessels. Chow wrote contracts that overpaid a Keppel agent in Brazil. The agent used the overpayments to bribe Brazilian officials.
- Chow said, "I should have refused to draft the contract that we used for paying bribes and I should have resigned from Keppel," according to Reuters.
- Keppel admitted paying \$55 million in bribes to officials in Brazil during a decade-long scheme.
- In December 2017, Keppel Offshore and its U.S. subsidiary agreed to pay a total penalty of more than **\$422 million** to resolve corruption charges with authorities in the United States, Brazil, and Singapore.
- Chow, as part of the plea agreement, helped the DOJ prosecute other executives at the company.

Ref: <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsiary-agree-pay-422-million-global-penalties>

FCPA – Overview

- The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA")
- The FCPA prohibits any payment or offer of payment to a "foreign official" for the purpose of influencing that official to misuse his or her official position to assist in obtaining or retaining business or any other unfair advantage for a company (15 U.S.C. §78dd-1(a),(f))
- Payment need not occur – the “intent” is enough
- Includes 3rd Parties

FCPA – Overview

- Anything of value: gifts, entertainment, travel expenses/accommodations
- Foreign Official: also includes spouses/immediate family members & employees/officials of business entities that appear privately held but have element of government control

Ref: <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>

FCPA – Overview

Enforcement Actions (sampling):

2018: 4 as of 06.04.2018

2017: 7

2016: 26

2015: 9

2014: 8

Key statistics from 1977 to Present

District of Columbia (121)

Most active district court

208

Total Number of FCPA-related enforcement actions brought by the SEC

325

Total number of FCPA-related enforcement actions brought by the DOJ

92.58

% of Defendants Who Settle with SEC

76.27

% of Defendants Who Settle with DOJ

Agent/Consultant/Broker

Most common type of third-party intermediary

\$ 4,902,913,195

Total bribery payments made in all FCPA-related enforcement actions

\$ 11,010,692,317

Total monetary sanctions imposed in all FCPA-related enforcement actions

Oil & Gas

Most frequently sued industry

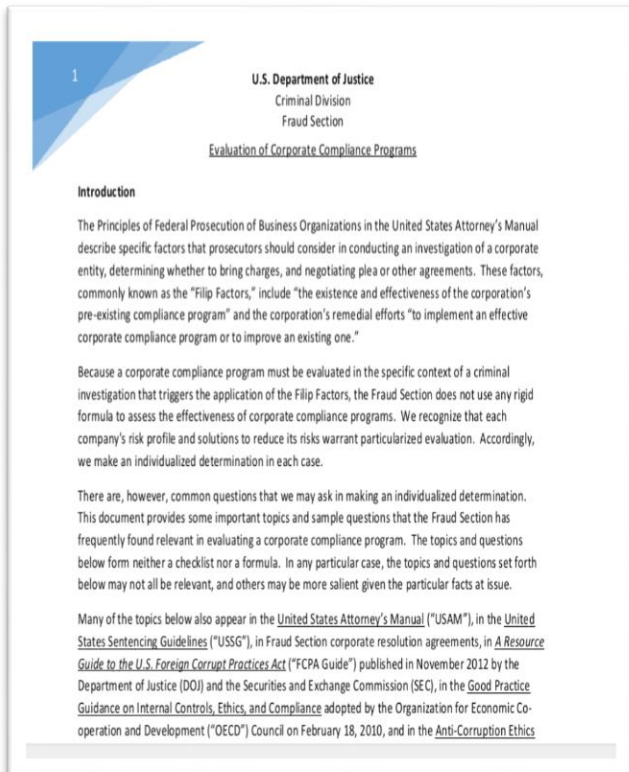
Chart: Stamford Law School: <http://fcpa.stanford.edu/statistics-keys.html>

FCPA – Resources

Two Resources to Support:

1) FCPA Guidance – 11/2012

<https://www.justice.gov/criminal-fraud/fcpa-guidance>



2) U.S. Dept. of Justice; Criminal Division; Fraud Section: “*Evaluation of Corporate Compliance Programs*”-02/2017

<https://www.justice.gov/criminal-fraud/page/file/937501/download>

Top FCPA Misconceptions

- We have a policy and conduct training – so we have nothing to worry about.

Typical Components of a Plan:

- The Corporate Policy – Code of Ethics
- Buy-in from the Top/Commitment – “Tone for the Top” (actions and words)
- Materials for Employees (“Tool Kit”): Training (include BOD), FAQs, Due Diligence Checklists, Sample Contract Provisions/Language
- Outline as to “How to Handle” situations – provide guidance
- Local laws of countries doing business with
- Certification for employees/agents
- Whistleblower/reporting mechanism
- Internal database for documentation/recordkeeping
- Oversight/monitoring
- Outline consequences

Top FCPA Misconceptions (cont.)

- Does the Size of the Company Matter?
 - We are not a “large” company so the government will not care about us
 - We are a “large” company so our policies/procedures are sufficient

Top FCPA Misconceptions (cont.)

- Only the “sales” personnel need training since they interact with “foreign officials”
 - Employees that travel for maintenance, inspections, deliveries, etc...
 - Employees dealing with Customs

Top FCPA Misconceptions (cont.)

- Only “large” payments trigger the FCPA
 - Actual payment need not occur
 - Intent governs

Top FCPA Misconceptions (cont.)

We can use the Exceptions and/or have an Affirmative Defense

- Exceptions: (15 U.S.C. §78dd-1(b))
 - “Facilitating or expediting payments”
 - routine government action
 - Extortion/duress

- Affirmative Defenses: (15 U.S.C. §78dd-1(c))
 - Payment lawful under written laws of foreign country
 - “Reasonable and bona fide business expenditure”

FCPA Investigations/Enforcement

- **Penalties**

- Imprisonment

- Anti-bribery: Up to 5 years
- Accounting: Up to 20 years

- Criminal Fines

- Anti-bribery: Up to \$2 million (corporations); \$250,000 (individual)
- Accounting: Up to \$25 million (corporations); \$5 million (individual)

- Civil Penalties

- Anti-bribery: Up to \$16,000 per violation
- Accounting: Up to \$750,00 (corporations); \$150,000 (individual) or up to the amount of the gross pecuniary gain

FCPA Enforcement

- FCPA is major source of monetary recoveries by federal government
 - 2016: \$2.43 billion - fines and penalties recovered
 - 2017: \$934 million - fines and penalties recovered
 - 2018 (as of 06.2018): \$291 million - fines and penalties recovered
- Few litigated cases
 - Civil settlements
 - Deferred prosecution agreements and nonprosecution agreements
 - Guilty pleas
- Compliance monitors

Ref: Stanford Law School: <http://fcpa.stanford.edu/chart-penalties.html>

FCPA Risks/Warning Signs

- Countries with history of corruption
- Countries with extensive government involvement in economy
- Suspicious commissions
- Expense reports with little to no backup

Thank You



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